SUPREME COURT OF CANADA

CITATION: R. *v.* Stairs, 2022 SCC 11

APPEAL HEARD: November 2, 2021
JUDGMENT RENDERED: April 8, 2022
DOCKET: 39416

BETWEEN:

Matthew Stairs
Appellant

and

Her Majesty The Queen
Respondent

- and -

Attorney General of Ontario and Canadian Civil Liberties Association
Interveners

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 103) Moldaver and Jamal JJ. (Wagner C.J. and Rowe and Kasirer JJ. concurring)

CONCURRING REASONS: (paras. 159 to 177)	Côté J.
DISSENTING REASONS: (paras. 104 to 158)	Karakatsanis J. (Brown and Martin JJ. concurring)

Matthew Stairs *Appellant*

v.

Her Majesty The Queen *Respondent*

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Attorney General of Ontario and
Canadian Civil Liberties Association *Interveners*

Indexed as: R. *v.* Stairs

2022 SCC 11

File No.: 39416.

2021: November 2; 2022: April 8.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Search and seizure — Search incident to arrest — Police arresting accused in basement of his home following report

of domestic violence — Police conducting clearing search of basement living room after arrest and finding methamphetamine — Accused convicted of possession of controlled substance for purpose of trafficking — Whether common law standard for search incident to arrest should be modified when search conducted in home — Whether clearing search of basement living room was lawful search incident to arrest — Canadian Charter of Rights and Freedoms, s. 8.

A call was placed to 9-1-1 to report a man repeatedly hitting a woman in a car. Police officers located the car parked in the driveway of a house. They knocked on the front door and loudly announced their presence, but no one answered. Fearing for the woman's safety, they entered the house. A woman with fresh injuries to her face came up a flight of stairs leading from the basement. The accused then ran past the bottom of the staircase and barricaded himself in the basement laundry room, where he was arrested a short time later. After the arrest, the police conducted a visual clearing search of the basement living room area, from which the accused and the woman had just emerged. During the search, the police saw a clear container and a plastic bag in plain view containing methamphetamine. The accused was charged with possession of a controlled substance for the purpose of trafficking, and with assault and breach of probation.

The accused brought a pre-trial application alleging, among other things, violations of his right against unreasonable search and seizure protected by s. 8 of the *Charter*. The trial judge found no breach of s. 8 and no basis to exclude the

methamphetamine. She held that it was reasonable for the officers to do a quick scan of the basement living room after the accused was arrested, that the search had a valid objective, and that the search and resulting seizure were lawful. The accused was convicted of all charges. He appealed his conviction for the drug offence on the basis that the drug evidence was improperly admitted. A majority of the Court of Appeal upheld the conviction, holding that the search and subsequent seizure of the methamphetamine did not breach the accused's s. 8 *Charter* rights. The majority was of the view that the search was a search incident to a lawful arrest, that the common law standard for search incident to arrest applied, and that the search of the basement living room met this standard.

Held (Karakatsanis, Brown and Martin JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and **Moldaver**, Rowe, Kasirer and **Jamal** JJ.: The basic common law standard for search incident to arrest continues to apply when the police search an area of the arrested person's home that is within that person's physical control. The common law standard permits the police to search a lawfully arrested person and to seize anything in their possession or the surrounding area of the arrest to guarantee the safety of the police and the arrested person, prevent the person's escape, or provide evidence against them. Specifically, it permits a search of the person arrested and the surrounding area of the arrest when (1) the arrest is lawful; (2) the search is incidental to the arrest, such that there is some reasonable basis for the search connected

to the arrest and the search is for a valid law enforcement purpose, including safety, evidence preservation, or evidence discovery; and (3) the nature and extent of the search are reasonable.

However, where the area searched in the arrested person's home is outside that person's physical control at the time of the arrest — but the area is sufficiently proximate to the arrest — the common law standard for search incident to arrest must be modified to pass constitutional muster under s. 8 of the *Charter*. The purpose of the distinction between the areas within and outside of the arrested person's physical control is to recognize that the more extensive the warrantless search in a home, the greater the potential for violating privacy. The key question in determining whether an area is sufficiently proximate to the arrest is whether there is a link between the location and purpose of the search and the grounds for the arrest. The inquiry is highly contextual; the determination must be made using a purposive approach to ensure that the police can adequately respond to the wide variety of factual situations that may arise. Depending on the circumstances, the surrounding area may be wider or narrower.

Specifically, where the area searched incident to arrest in a home is outside the arrested person's physical control at the time of the arrest, the common law standard for search incident to arrest must be modified in two ways that make the standard stricter. First, the police must have reason to suspect that there is a safety risk to the police, the arrested person, or the public which would be addressed by a search. Reasonable suspicion is a higher standard than the common law standard for search

incident to arrest. The police require a constellation of objectively discernible facts assessed against the totality of the circumstances giving rise to the suspicion of the risk. Relevant considerations include (a) the need for a search; (b) the nature of the apprehended risk; (c) the potential consequences of not taking protective measures; (d) the availability of alternative measures; and (e) the likelihood that the contemplated risk actually exists. Moreover, when assessing police conduct, the reviewing judge must be alive to the volatility and uncertainty that police officers face — the police must expect the unexpected.

Second, the police must carefully tailor their searches incident to arrest in a home to ensure that they respect the heightened privacy interests implicated. The search incident to arrest power only permits police to search the surrounding area of the arrest. The nature of the search must be tailored to its specific purpose, the circumstances of the arrest, and the nature of the offence. The search should be no more intrusive than is necessary to resolve the police's reasonable suspicion.

In the present case, the basement living room search met the standard for reasonable suspicion, both in terms of its subjective and objective components. It was open to the trial judge to conclude that the police subjectively believed there was a safety risk that would be addressed by conducting a clearing search of the living room, which was a valid law enforcement purpose. It was equally open to the trial judge to find that it was objectively reasonable for the police to clear the area for hazards and other occupants. The dynamic before and during the arrest and the nature of the offence

for which the accused was arrested were factors that figured prominently in the reason-to-suspect analysis. The situation was volatile and rapidly changing, and the arrest was for domestic assault. In domestic violence cases, the police are not only concerned with the privacy and autonomy of the person arrested; they must also be alert to the safety of all members of the household, including both known and potential victims. In addition, the search was conducted reasonably. It took place right after the arrest and the police merely conducted a visual scan of the living room area to ensure that no one else was present and that there were no weapons or hazards. The spatial scope of the search was appropriate: the living room was part of the surrounding area of the arrest, it appeared to be a common living room space, and the police engaged in the most cursory of searches, which was the least invasive possible.

The search of the living room incident to arrest did not violate the accused's s. 8 *Charter* right, and the evidence from the living room search was therefore properly admitted at trial.

Per **Karakatsanis**, Brown and Martin JJ. (dissenting): The appeal should be allowed, the accused's conviction for possession of a controlled substance for the purpose of trafficking set aside and an acquittal entered. The police's warrantless search and seizures did not comply with s. 8 of the *Charter*. The evidence should be excluded under s. 24(2) of the *Charter* in that its admission would bring the administration of justice into disrepute.

The warrant requirement is a foundational check on police powers, and a cornerstone of Canada's constitutional order. Any exceptions should be exceedingly rare. Still, some exceptions exist, including the common law power of search incident to arrest. In some cases, the Court has modified or tailored the common law framework to account for particularly compelling individual interests. The strong privacy interests in a home call for modifying the common law standard in a search incident to arrest. A home is the setting of individuals' innermost lives: at once a shield from the outside world and a biographical record, its sanctity is indispensable. However, while privacy interests in a home are significant, so too are the interests in protecting police and public safety. Police must be able to address the hazards that may arise in unfamiliar, and potentially hostile, environments, not least when investigating volatile offences like domestic violence. Weighing the privacy and law enforcement interests under s. 8, the balance is best struck by authorizing police to conduct a search incident to arrest inside a home when they reasonably suspect there is an imminent threat to the safety of police or the public. Contrary to the standard set by the majority, the threat must be imminent. The safety risks that arise from an arrest in a home, for which a warrant cannot feasibly be procured, will generally be imminent. And imminence is a useful concept because it defines those circumstances where obtaining a warrant is not feasible. It signals that if police can get a warrant before searching a home, they should do so.

While reasonable suspicion is a relatively low threshold, it still requires the officers to articulate some basis to suspect safety may be at risk. As in other searches incident to arrest, they must have both subjective and objectives grounds for the search.

The court's task is to examine the evidence of the actual reasons for the search — and not whether reasonable suspicion could have justified the search. Ultimately, the task for the courts is, in each case, to apply the standard in light of the specific evidence before them, focusing on the reasons actually relied on by the officer. The issue is whether the search was constitutional at the time it was carried out.

Alongside the reasonable suspicion standard, the permissible scope of a search serves as another limitation on the police's ability to conduct a search incident to arrest inside a home. This constrains searches in two ways: by the nature of the concerns animating the arrest, and by the need for temporal and spatial proximity between the search and the arrest. Just as the authority for a search incident to arrest derives from the arrest itself, a search is only justifiable if the purpose of the search is related to the purpose of the arrest. An arrest that only gives rise to safety concerns cannot, without more, authorize a search for matters unrelated to safety. There must be a purposive link to the nature of the arrest. A search that falls within those parameters must also be spatially and temporally proximate to the arrest.

In the instant case, the search and seizures were not justified. The police only searched the basement once the accused had been handcuffed and the victim had gone upstairs. There were no particularized facts to justify a safety search, only generalized uncertainty about the presence of weapons or other people. The searching officer gave no basis to ground a reasonable suspicion that anybody's safety was at risk

following the accused's arrest. The search and seizures were therefore unlawful and violated the accused's s. 8 *Charter* rights.

The evidence ought to be excluded under s. 24(2) of the *Charter*. The state conduct in this case falls on the higher end of the spectrum and favours exclusion. It was well known that private homes attract a high privacy interest and generally cannot be searched without a warrant. The accused's privacy interests inside the home were significant and the unlawful search and seizures were a major incursion on his *Charter*-protected interests, which strongly favours exclusion. The drugs were, however, highly reliable evidence that was central to the Crown's case, which strongly favours inclusion. Weighing all three inquiries, the admission of the evidence would bring the administration of justice into disrepute. The evidence is therefore inadmissible.

Per **Côté** J.: There is agreement with Karakatsanis J. on the reasonable suspicion standard for searches incident to arrest inside a home, with her application of the standard to the facts of the case and with her conclusion that the search and seizure of the evidence infringed S's rights pursuant to s. 8 of the *Charter*. However, the unlawfully seized evidence should not be excluded as admitting the evidence would not bring the administration of justice into disrepute. The appeal should therefore be dismissed.

The seriousness of the *Charter*-infringing police conduct favours admission of the evidence. The seriousness of the infringement is attenuated by the

uncertainty of the law regarding residential searches incident to arrest. Given the uncertainty in the law and the otherwise reasonable manner in which the search was carried out, the seriousness of the police misconduct was at the lowest end of the spectrum. The Crown concedes that the police conduct had a serious impact on S's *Charter*-protected privacy interests which favours exclusion of the evidence. However, society's interest in an adjudication of S's drug charges on the merits favours admission of the evidence.

On balance, the evidence should not be excluded under s. 24(2) of the *Charter*. Going forward, it will be very difficult for police to justify admission in a similar scenario. However, the police were acting in good faith on their understanding of unsettled law and society has a strong interest in the adjudication of a charge involving a large quantity of a highly dangerous street drug.

Cases Cited

By Moldaver and Jamal JJ.

Applied: *R. v. Golub* (1997), 34 O.R. (3d) 743; **distinguished:** *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37; **considered:** *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621; *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679; *R. v. Saeed*, 2016 SCC 24, [2016] 1 S.C.R. 518; *R. v. Caslake*, [1998] 1 S.C.R. 51; **referred to:** *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *Eccles v. Bourque*, [1975] 2 S.C.R. 739; *Semayne's Case* (1604), 5 Co. Rep. 91a, 77 E.R. 194;

R. v. Tessling, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Silveira*, [1995] 2 S.C.R. 297; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Pohoretsky*, [1987] 1 S.C.R. 945; *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851; *Chimel v. California*, 395 U.S. 752 (1969); *Maryland v. Buie*, 494 U.S. 325 (1990); *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220; *R. v. Godoy*, [1999] 1 S.C.R. 311; *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. Beare*, [1988] 2 S.C.R. 387; *Jensen v. Stemmer*, 2007 MBCA 42, 214 Man. R. (2d) 64; *R. v. Dodd* (1999), 180 Nfld. & P.E.I.R. 145; *R. v. Lowes*, 2016 ONCA 519.

By Karakatsanis J. (dissenting)

R. v. Silveira, [1995] 2 S.C.R. 297; *R. v. Caslake*, [1998] 1 S.C.R. 51; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37; *R. v. Collins*, [1987] 1 S.C.R. 265; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Simmons*, [1988] 2 S.C.R. 495; *R. v. Grant*, [1993] 3 S.C.R. 223; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Saeed*, 2016 SCC 24, [2016] 1 S.C.R. 518; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621; *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679; *Eccles v. Bourque*, [1975] 2 S.C.R. 739; *R. v. Godoy*, [1999] 1 S.C.R. 311; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202; *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Golub* (1997), 34 O.R. (3d) 743; *Baron v. Canada*, [1993] 1 S.C.R. 416; *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. Grant*, 2009 SCC 32, [2009] 2

S.C.R. 353; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692.

By Côté J.

Referred to: *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621; *R. v. Pileggi*, 2021 ONCA 4, 153 O.R. (3d) 561; *R. v. Kelsy*, 2011 ONCA 605, 280 C.C.C. (3d) 456; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Saeed*, 2016 SCC 24, [2016] 1 S.C.R. 518; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 9, 24(2).

Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 5(2).

Criminal Code, R.S.C. 1985, c. C-46, ss. 266, 487.11, 529 to 529.5, 733.1(1).

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Ruff, Lanette. "Does Training Matter? Exploring Police Officer Response to Domestic Dispute Calls Before and After Training on Intimate Partner Violence" (2012), 85 *Police J.* 285.

APPEAL from a judgment of the Ontario Court of Appeal (Fairburn A.C.J.O. and Nordheimer and Harvison Young JJ.A.), 2020 ONCA 678, 153 O.R. (3d) 32, 396 C.C.C. (3d) 369, 67 C.R. (7th) 10, 467 C.R.R. (2d) 354, [2020] O.J. No. 4590 (QL), 2020 CarswellOnt 15663 (WL Can.), affirming the conviction for possession for the purpose of trafficking entered by Coats J., 2018 ONSC 3783, [2018] O.J. No. 3264 (QL), 2018 CarswellOnt 9791 (WL Can.). Appeal dismissed, Karakatsanis, Brown and Martin JJ. dissenting.

Erin Dann and *Lisa Freeman*, for the appellant.

Mark J. Covan and *Diana Lumba*, for the respondent.

Mabel Lai and *Nicole Rivers*, for the intervener the Attorney General of Ontario.

Anil K. Kapoor and *Victoria M. Cichalewska*, for the intervener the Canadian Civil Liberties Association.

The judgment of Wagner C.J. and Moldaver, Rowe, Kasirer and Jamal JJ. was delivered by

MOLDAVER AND JAMAL JJ. —

I. Overview

[1] This appeal concerns the permissible scope of a search incident to arrest in a person's home. In particular, the Court has been asked to delineate the proper balance under s. 8 of the *Canadian Charter of Rights and Freedoms* between an accused's privacy interests in their home and valid law enforcement objectives, when the police search an accused's home incident to their lawful arrest. As we will explain, a proper balancing of those factors requires modifying the common law standard governing searches incident to arrest.

[2] This case arises in the aftermath of a volatile arrest in the home of the appellant, Matthew Stairs, for domestic violence. The police responded to a 9-1-1 caller who reported seeing a man repeatedly hitting a woman in a car. Police officers promptly located the suspect car parked in the driveway of an unknown house. After a quick scan of the car's interior, they knocked on the front door of the house and loudly announced their presence, but no one answered. Fearing for the woman's safety, the police entered the house. Upon announcing their presence, a woman with fresh injuries to her face came up a flight of stairs leading from the basement. Mr. Stairs did not follow. Instead, he ran past the bottom of the staircase and barricaded himself in the basement laundry room, where he was arrested a short time later.

[3] After the arrest, the police conducted a visual clearing search of the basement living room area, from which Mr. Stairs and the woman had just emerged. The purpose of the search was to ensure that nobody else was present and that there were no hazards or weapons sitting out in the open. During the search, the police saw a clear container and a plastic bag in plain view containing methamphetamine. This resulted in Mr. Stairs being charged with possession for the purpose of trafficking (contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), in addition to charges of assault and breach of probation (contrary to ss. 266 and 733.1(1) of the *Criminal Code*, R.S.C. 1985, c. C-46). He was convicted of all charges at trial.

[4] Mr. Stairs appealed his conviction for the drug offence on the basis that the drug evidence was improperly admitted. In a split decision, a majority of the Court of Appeal for Ontario upheld the conviction. The dissenting judge would have set aside the conviction and entered an acquittal.

[5] Mr. Stairs now appeals as of right to this Court regarding his conviction for the drug offence. He argues that the common law standard for search incident to arrest must be modified for searches conducted in a home given the very high privacy interests that apply to a person's home. He asserts that where the police search for safety purposes, as alleged in his case, they can only do so if they have reasonable grounds to believe, or at least suspect, that there is an imminent threat to public or police safety. Mr. Stairs claims that this standard was not met and that the search of the basement living room by the police was therefore unconstitutional. Further, he says,

the methamphetamine seized by the police should have been excluded from the evidence and an acquittal must be entered with respect to the charge of possession of a controlled substance for the purpose of trafficking.

[6] The baseline common law standard for search incident to arrest requires that the individual searched has been lawfully arrested, that the search is truly incidental to the arrest in the sense that it is for a valid law enforcement purpose connected to the arrest, and that the search is conducted reasonably (*R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at paras. 21 and 27). In the past, this Court has tailored this standard in several contexts to comply with s. 8 of the *Charter*. The search incident to arrest power has been eliminated for the seizure of bodily samples (*R. v. Stillman*, [1997] 1 S.C.R. 607), and the standard has been modified in other situations presenting a heightened privacy interest in the subject matter of the search, such as strip searches, penile swabs, and cell phone searches (*R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679; *R. v. Saeed*, 2016 SCC 24, [2016] 1 S.C.R. 518; *Fearon*).

[7] While we agree with Mr. Stairs that the common law standard should be modified — and made stricter — to reflect an accused's heightened privacy interest in their home, we do not accept the test he proposes. Given the facts of this case, his submissions were directed solely to safety searches and did not extend to investigative purposes, such as evidence preservation and evidence discovery.

[8] Balancing the demands of effective law enforcement and a person's right to privacy in their home, we conclude that the common law standard for a search of a

home incident to arrest must be modified, depending on whether the area searched is within or outside the physical control of the arrested person. Where the area searched is within the arrested person's physical control, the common law standard continues to apply. However, where the area is outside their physical control, but it is still sufficiently proximate to the arrest, a search of a home incident to arrest for safety purposes will be valid only if:

- the police have reason to suspect that there is a safety risk to the police, the accused, or the public which would be addressed by a search; and

- the search is conducted in a reasonable manner, tailored to the heightened privacy interests in a home.

[9] Given the factual matrix of this case, it is not necessary to decide whether reasonable suspicion also applies to investigation-related purposes, such as evidence preservation and evidence discovery. We leave this issue for another day.

[10] Applying the stricter standard to this case, the police, in our view, had reason to suspect that there was a safety risk in the basement living room and that their concerns would be addressed by a quick scan of the room, which was the least intrusive manner of search possible in the circumstances. It follows that Mr. Stairs' s. 8 *Charter* rights were not breached, and the drug evidence was properly admitted. Accordingly, we would dismiss the appeal.

II. Facts

[11] A civilian called 9-1-1 to report that he had witnessed a male driver striking his female passenger. The caller said the man was swerving on the road while hitting the woman in a "flurry of strikes". At one point, the man had the woman in a headlock and she looked like she was "turtling" (huddling to protect herself).

[12] Three officers — Officers Brown, Martin, and Vandervelde — were dispatched to investigate the reported assault. They quickly located a car closely matching the caller's description parked in the driveway of an unknown home. The officers ran the plate number and were informed that the car was registered to Mr. Stairs' father, who also lived at the home. The police also learned that Mr. Stairs was a known driver of the car and that he had cautions for escape risk, family violence, and violence. He was also listed as a high-risk offender.

[13] After briefly looking inside the car, the police knocked on the front door of the house several times and loudly announced their presence, but no one answered. Believing the woman might be in danger, two of the officers entered the house through an unlocked side door and then opened the front door for their colleague. The officers continued to announce their presence and shouted at everyone in the house to "come upstairs" with their "hands up" (2018 ONSC 3747, 412 C.R.R. (2d) 95 ("pre-trial application reasons"), at para. 86). A woman, seen to be coming from the right side of the basement, made her way up to the first floor. She had fresh injuries, including markings and swelling around her forehead and eyes, cuts on her cheek, and scratches.

Officer Brown spoke with her briefly. He testified that while she was not combative, she was not cooperative either. Officer Martin, then a constable-in-training, remained upstairs with her, while the other two officers turned their attention to her assailant.

[14] From the top of the stairs, Officer Vandervelde saw a man, who turned out to be Mr. Stairs, run past the bottom of the staircase from the right side of the basement to the left side. Officer Vandervelde briefly made eye contact with him. Mr. Stairs ignored the police commands to come upstairs with his hands up. Instead, he locked himself in the basement laundry room adjacent to the living room from where he and the woman had just emerged.

[15] Officer Vandervelde and Officer Brown moved downstairs to arrest Mr. Stairs. On the way down, they took a quick look over their shoulders at the basement living room; their focus, however, was on Mr. Stairs, who by now was in the laundry room located to the left of the staircase. Officer Vandervelde had his firearm drawn, and Officer Brown had his taser drawn. At one point, Mr. Stairs opened the laundry room door, shrieked, and immediately closed the door. Eventually, he came out and complied with the officers' commands. Officer Brown handcuffed and searched him, locating only a sum of money. Officer Brown also looked around the laundry room to confirm that no one else was there. Four minutes had passed from when the police knocked on the front door to the arrest. Officer Brown described the situation as fast-moving and dynamic.

[16] After the arrest, Officer Vandervelde conducted a visual clearing search of the adjoining living room, which contained a coffee table, a couch, a television, and cabinets. From where he was standing, he could not see what was behind the couch or the television stand, so he walked behind the couch. There, he saw a transparent plastic Tupperware container in plain view on the floor. It contained glass-like shards, which he believed to be methamphetamine. He said that the container was about a foot from the couch and that he did not have to move any items to see it. He also saw a ziplock bag next to the coffee table that looked like it contained methamphetamine. He did not open any doors or cupboards in the living room.

[17] At a pre-trial application to exclude evidence, Officer Vandervelde maintained that the purpose of the clearing search was to confirm that "no one else was there" and that there were "no other hazards" (pre-trial application reasons, para. 282). When asked whether he was looking for weapons connected to the assault, he said: "Not, not necessarily connected to the assault, no. You don't want to be in a basement where weapons or firearms are sitting out in [the] open though" (A.R., vol. I, at p. 225).

[18] Officer Vandervelde was shown a photo of the area behind the couch and asked in chief to put an "X" where he had found the Tupperware container. He could not say exactly where, only that it was behind the couch in an open area on the ground. He also could not remember whether he removed the lid before or after he left the home.

[19] After Officer Brown looked around the laundry room to confirm that no one else was there, he went upstairs to speak to the woman again. At the pre-trial application, he testified that she provided little information. She denied that Mr. Stairs had assaulted her and insisted that they were just "playing around" (pre-trial application reasons, para. 28).

III. Decisions Below

[20] Mr. Stairs brought a pre-trial application alleging several violations of his rights under s. 8 of the *Charter* (the right against unreasonable search and seizure) and s. 9 of the *Charter* (the right against arbitrary detention). The only issue that remains before this Court is whether the clearing search of the basement living room was a lawful search incident to arrest. Our summaries of the decisions under review focus on this issue.

A. *Ontario Superior Court of Justice, 2018 ONSC 3747, 412 C.R.R. (2d) 95 (Coats J.)*

[21] The trial judge found no breach of s. 8 of the *Charter*. It was reasonable for the officers to do a quick scan of the basement living room after Mr. Stairs was arrested. Much as the officers had taken a passing over-the-shoulder look at the room on their way down to the basement, their focus at the time was on Mr. Stairs, who was, by then, in the laundry room.

[22] The search had a valid objective. Officer Vandervelde testified that he went to the living room to make sure that no one else was there and that there were no other hazards. This objective was reasonable because both the woman and Mr. Stairs had come from this area, the officers could not see fully into the living room as they came down the stairs, and their initial momentary glance did not completely address safety concerns.

[23] The search and resulting seizure were lawful. The Tupperware container and bag in which the methamphetamine was found were both in plain view and transparent. While Officer Vandervelde could not mark the exact location of the Tupperware container on a photo of the living room, this did not weaken his testimony about its general location. In addition, the trial judge accepted Officer Vandervelde's testimony that he believed there was methamphetamine in the container and the plastic bag before picking them up. As a result, the trial judge found no basis to exclude the methamphetamine.

B. *Court of Appeal for Ontario, 2020 ONCA 678, 153 O.R. (3d) 32 (Fairburn A.C.J.O. and Harvison Young J.A., Nordheimer J.A. Dissenting)*

(1) Majority — Fairburn A.C.J.O. and Harvison Young J.A.

[24] Writing for the majority, Fairburn A.C.J.O. dismissed the appeal. In her view, the trial judge correctly concluded that the search and subsequent seizure of the methamphetamine did not breach Mr. Stairs' s. 8 *Charter* rights.

[25] The central disagreement between the majority and the dissent concerned the applicability of this Court's decision in *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37. There, the Court held that the police needed reasonable grounds to believe that there was an imminent threat to public or police safety in order to enter and search a home.

[26] The majority rejected the applicability of this test because the factual matrix in *MacDonald* differed materially from this case. In the majority's view, unlike *MacDonald*, the search here was a search incident to a lawful arrest and the common law standard for search incident to arrest applied — i.e., a search in the surrounding area of the arrest will be valid if the purpose of the search was a valid law enforcement objective connected to the arrest and the purpose was objectively reasonable in the circumstances.

[27] The search of the basement living room met this standard. The police searched the living room to ensure that no one else was there and that there were no other hazards. These safety concerns made sense in the circumstances: the police were in an unknown basement; they did not know how many people were in the house; they could not see behind the couch when coming down the stairs; and the living room was right next to the stairs, which the police needed to ascend to get Mr. Stairs out of the home safely. It was objectively reasonable for the police to take a quick visual scan of the basement living room. Since the methamphetamine was in plain view, the police

were entitled to seize it under the plain view doctrine. Accordingly, the majority dismissed Mr. Stairs' appeal from his conviction on the drug offence.

(2) Dissent — Nordheimer J.A.

[28] In dissent, Nordheimer J.A. would have allowed Mr. Stairs' appeal, set aside his conviction on the drug offence, and entered an acquittal. In his view, this case was indistinguishable from *MacDonald*. When the police engage in a safety search in a home without a warrant — even a search incident to a lawful arrest — they must have reasonable grounds to believe that there is an imminent threat to public or police safety.

[29] Here, the police had no reasonable grounds to believe, or even suspect, that there would be weapons, hazards, or other people in the living room that would pose a threat. Any concerns the police might have had about the possibility of guns amounted to no more than the type of vague safety concern that *MacDonald* cautioned against. As a result, the dissenting judge found a s. 8 *Charter* breach. He would have excluded the evidence under s. 24(2).

IV. Issues

[30] This appeal raises two issues: (1) whether the search of the basement living room incident to arrest was unreasonable, contrary to s. 8 of the *Charter*; and (2) if so, whether the methamphetamine seized by the police should be excluded under s. 24(2) of the *Charter*.

[31] For the reasons that follow, we would dismiss the appeal. We are not persuaded that Mr. Stairs' s. 8 *Charter* rights were violated. Accordingly, we need not address s. 24(2) of the *Charter*.

V. Analysis

[32] This Court has enunciated a two-part analytical approach for determining whether the common law standard for search incident to arrest should be modified to comply with s. 8 of the *Charter* (see *Stillman*, *Golden*, *Fearon*, and *Saeed*):

(1) Stage One: Determine whether the search satisfies the common law standard for search incident to arrest.

(2) Stage Two: If so, determine whether the standard must be modified to comply with s. 8 of the *Charter*, given the particular privacy interests and law enforcement objectives at stake.

[33] Applying this approach, we conclude that the common law standard for search incident to arrest in a home must be modified.

A. *Stage One: The Common Law Standard for Search Incident to Arrest*

[34] The common law standard for search incident to arrest permits the police to search a lawfully arrested person and to seize anything in their possession or the

surrounding area of the arrest to guarantee the safety of the police and the arrested person, prevent the person's escape, or provide evidence against them (*Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at pp. 180-81). This search power is "extraordinary" because, unlike other police powers, it requires neither a warrant nor reasonable and probable grounds (*Fearon*, at paras. 16 and 45).

[35] The common law standard for search incident to arrest is well established. As explained in *Fearon*, at paras. 21 and 27, it requires that (1) the individual searched has been lawfully arrested; (2) the search is truly incidental to the arrest in the sense that it is for a valid law enforcement purpose connected to the arrest; and (3) the search is conducted reasonably.

[36] Under the second step, valid law enforcement purposes for search incident to arrest include (a) police and public safety; (b) preventing the destruction of evidence; and (c) discovering evidence that may be used at trial (*Fearon*, at para. 75).

[37] The police's law enforcement purpose must be subjectively connected to the arrest, and the officer's belief that the purpose will be served by the search must be objectively reasonable (*R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 19). To meet this standard, the police do not need reasonable and probable grounds for the search. Instead, they only require "some reasonable basis" to do what they did (*Caslake*, at para. 20). This is a much lower standard than reasonable and probable grounds.

[38] This Court explained the distinction between the "some reasonable basis" standard and the higher "reasonable and probable grounds" standard in *Caslake*, at para. 20:

> To give an example, a reasonable and probable grounds standard would require a police officer to demonstrate a reasonable belief that an arrested person was armed with a particular weapon before searching the person. By contrast, under the standard that applies here, the police would be entitled to search an arrested person for a weapon if under the circumstances it seemed reasonable to check whether the person might be armed.

[39] Mr. Stairs does not dispute that the search of the living room met the common law standard for search incident to arrest. Instead, his primary submission is that the standard must be modified for a search of a home incident to arrest given the heightened privacy interests implicated in a home. We will therefore move directly to stage two.

B. *Stage Two: Determining Whether the Common Law Standard Must Be Modified*

[40] In certain situations, the common law standard for search incident to arrest must be modified to give effect to s. 8 of the *Charter*. As indicated, this Court has modified the standard in several contexts to balance (a) the nature and extent of the privacy interests implicated; and (b) the importance of the police's law enforcement objectives. The jurisprudence includes a spectrum of standards, with some contexts requiring a higher threshold for a search incident to arrest than others.

(1) The Spectrum of Search Incident to Arrest Cases

[41] To determine the appropriate standard in this case, we begin by reviewing the standards in other cases, starting with the most stringent. We then place home searches on the spectrum.

[42] In *Stillman*, this Court determined that the common law standard for search incident to arrest does not apply to the seizure of bodily substances, including hair samples, teeth impressions, and buccal swabs. While bodily samples can help in investigating crimes, particularly for establishing identity, they are usually in no danger of disappearing if they are not immediately seized (para. 49). Since the seizure of bodily substances invades an area of personal privacy essential to dignity and bodily integrity, the police must obtain a warrant. They cannot seize bodily samples incident to arrest without a warrant.

[43] The next set of cases on the spectrum are *Golden* and *Saeed*, which modified the common law standard for strip searches and penile swabs, respectively.

[44] In *Golden*, the Court noted that, unlike frisk searches, which this Court considered in *Cloutier*, strip searches are particularly invasive because they require the removal of clothing and visual inspection of a person's private areas. "Strip searches are . . . inherently humiliating and degrading", and inevitably involve a serious infringement of dignity and privacy (*Golden*, at para. 90). Strip searches also rarely need to be done immediately due to the low risk of disposal or loss of evidence.

Balancing these factors, the Court determined that a strip search requires (a) reasonable and probable grounds for the arrest itself; and (b) reasonable and probable grounds to conclude that a strip search is necessary in the particular circumstances of the arrest, that is, some evidence suggesting the possibility that the person arrested has concealed weapons or evidence related to the reason for arrest (*Golden*, at paras. 94 and 98). The strip search must also be done in a reasonable manner. The Court provided guidelines for when, where, and how strip searches are to be conducted.

[45] In *Saeed*, the Court looked to *Golden* and determined that there must be reasonable grounds to believe that a penile swab will afford evidence of the offence for which the accused was arrested. While penile swabs are very intrusive and impact the accused's dignity, in sexual assault cases there is a risk that highly reliable evidence will be lost, either through destruction of the evidence or degradation over time. To ensure that penile swabs are conducted in a reasonable and respectful manner, the Court provided guidelines as to when, where, and how these tests are to be conducted.

[46] Lower down the spectrum than *Golden* and *Saeed* is *Fearon*, where this Court considered cell phone searches incident to arrest. To reflect the high expectation of privacy in cell phones, the Court modified the search incident to arrest power in three ways. First, "[b]oth the nature and the extent of the search performed on the cell phone must be truly incidental to the particular arrest for the particular offence" (para. 76). Second, the police are only permitted to search for the purpose of discovering evidence when the investigation would "be stymied or significantly hampered absent the ability

to promptly search the cell phone incident to arrest" (para. 80). Third, "officers must make detailed notes of what they have examined on the cell phone" (para. 82).

[47] The lowest point on the spectrum of cases is where no change is required. An example is *Caslake*, where this Court declined to modify the common law standard for searches of vehicles incident to arrest. The Court found that there is no heightened expectation of privacy in a vehicle that would justify an exemption from the usual common law principles (para. 15).

(2) Assessing Searches in the Home

[48] To situate this case on the spectrum of cases where the common law standard has been modified, we must consider the relevant privacy interests and the police's law enforcement objectives in searches of a home incident to arrest.

(a) *Privacy Interest*

[49] This Court has emphasized time and again that a person's home attracts a high expectation of privacy. A fundamental and longstanding principle of a free society is that a person's home is their castle (*Eccles v. Bourque*, [1975] 2 S.C.R. 739, at pp. 742-43, per Dickson J. (as he then was), citing *Semayne's Case* (1604), 5 Co. Rep. 91a, 77 E.R. 194, at p. 195). The home is "where our most intimate and private activities are most likely to take place" (*R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 22). Moreover, this Court recognized in *R. v. Silveira*, [1995] 2 S.C.R.

297, at para. 140, per Cory J., that "[t]here is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling-house'".

[50] Given the privacy interests in the home, warrantless searches of the home are *prima facie* unreasonable. This was confirmed in *R. v. Feeney*, [1997] 2 S.C.R. 13, where the Court held that even if the police have an arrest warrant, they are not generally permitted to make an arrest *in a home* without a specific warrant permitting entry. Parliament later codified the principles in *Feeney* by introducing ss. 529 to 529.5 into the *Criminal Code* to govern when police may enter dwelling-houses to carry out arrests.

[51] Although people undoubtedly have a heightened privacy interest in their homes, searches of the home are nonetheless less intrusive than strip searches and penile swabs, which inevitably impact a person's dignity. As this Court noted in *Stillman*, "a violation of the sanctity of a person's body is much more serious" than an intrusion into their home (para. 42, citing *R. v. Pohoretsky*, [1987] 1 S.C.R. 945, at p. 949). In our view, while home searches may reveal highly personal and confidential information, they do not invariably infringe dignity and bodily integrity, as contemplated in *Stillman*, *Golden*, and *Saeed*.

(b) *Police Objectives*

[52] The police's law enforcement objectives will vary in searches of a home incident to arrest. Apart from the person targeted, there may be others in the home,

including potential victims needing help or aggressors posing a safety risk. While the circumstances of each case may differ, arrests within the home are often volatile and dynamic.

[53] Overall, the risks at play in the context of an in-home arrest are likely to be more pressing than those involved in strip searches and penile swabs. For strip searches, there is generally a low risk that hidden objects can be accessed or disposed of quickly (*Golden*, at para. 93). For penile swabs, there are no safety risks at play.

(c) *Balancing Privacy and Police Objectives*

[54] Balancing privacy interests in the home and police objectives leads us to conclude that home searches fall lower on the spectrum than *Golden* and *Saeed*. While home searches implicate serious privacy interests, they do not inevitably intrude into a person's dignity and bodily integrity. In addition, the police objectives will often be pressing and time-sensitive in the context of in-home arrests.

[55] Given the placement of home searches on the spectrum of cases, we cannot accept the Crown's submission that the common law standard provides sufficient protection for searches incident to arrest conducted in a home, including safety searches. That standard is too low given the privacy interests in the home. Nor do we accept Mr. Stairs' position — in line with the dissent at the Court of Appeal — that police safety searches incident to arrest in a home require a reasonable belief of imminent harm. That standard is too high given the pressing police objectives at stake.

A proper balancing of privacy and police objectives requires a modification of the common law standard that falls between those two poles.

(3) Modifications to the Common Law Standard

[56] To pass constitutional muster, the common law standard for search incident to arrest must be modified in two ways that make the standard stricter where the police search areas of the home outside the arrested person's physical control:

- the police must have reason to suspect that there is a safety risk to the police, the accused, or the public which would be addressed by a search; and

- the search must be conducted in a reasonable manner, tailored to the heightened privacy interests in a home.

[57] To facilitate comparison, we reiterate that the common law standard permits a search of the person arrested and the surrounding area of the arrest when (1) the arrest is lawful; (2) the search is incidental to the arrest, such that there is some reasonable basis for the search connected to the arrest and the search is for a valid law enforcement purpose, including safety, evidence preservation, or evidence discovery; and (3) the nature and extent of the search are reasonable. This standard was applied by the majority of the Court of Appeal in the case at hand.

[58] We will now explain each of the two modifications.

(a) *Reasonable Suspicion Required for Areas Outside the Arrested Person's Physical Control*

(i) Defining the Surrounding Area of the Arrest

[59] A search incident to arrest extends to the surrounding area of an arrest. However, this concept must be further calibrated to account for the unique considerations entailed by a search of a home. We must therefore distinguish between two subcategories within the surrounding area of an arrest:

(a) the area within the physical control of the person arrested at the time of arrest; and

(b) areas outside the physical control of that person, but which are part of the surrounding area because they are sufficiently proximate to the arrest.

The purpose of this distinction is to recognize that the more extensive the warrantless search, the greater the potential for violating privacy. As we explain below, different standards must be applied to these subcategories.

[60] The task of determining whether a particular area is part of the surrounding area of the arrest and which subcategory it falls under lies with the trial judge.

Consistent with this Court's jurisprudence, whether an area is sufficiently proximate to the arrest is a contextual and case-specific inquiry. The key question is whether there is a "link between the location and purpose of the search and the grounds for the arrest" (*R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851, at para. 49). The inquiry is highly contextual; the determination must be made using a purposive approach to ensure that the police can adequately respond to the wide variety of factual situations that may arise. Depending on the circumstances, the surrounding area may be wider or narrower. As one learned author notes: "A search incident to arrest can extend to the surrounding area, and so might include searching the building or vehicle in which the accused is arrested" (S. Coughlan, *Criminal Procedure* (4th ed. 2020), at p. 124).

[61] When the police make an arrest, under the existing common law standard, they may conduct a pat-down search and examine the area within the physical control of the person arrested. But when the police go outside the zone of physical control, the standard must be raised to recognize that the police have entered a home without a warrant. In these circumstances, it is not enough to satisfy the existing common law standard, which requires some reasonable basis for the search. Rather, the police must meet a higher standard: they must have reason to suspect that the search will address a valid safety purpose. We will say more about the reasonable suspicion standard in the section below.

[62] A similar approach has been adopted in the United States, where the jurisprudence distinguishes between areas inside and outside the arrested person's

physical control. Two cases, read together, illustrate this distinction. First, in *Chimel v. California*, 395 U.S. 752 (1969), at p. 763, the U.S. Supreme Court held that in the context of an in-home arrest, the search incident to arrest power permits police to search (a) the arrestee's person, as in a frisk search; and (b) the area "within his immediate control", meaning the area in which the arrested person might reach for a weapon or destructible evidence.

[63] Second, in *Maryland v. Buie*, 494 U.S. 325 (1990), the U.S. Supreme Court considered areas outside those discussed in *Chimel*. The court held that the police may engage in a protective sweep of a home after an arrest when there is a reasonable suspicion of danger. Even so, the search is limited to a cursory inspection of the spaces where a person may be found and may last no longer than necessary to dispel the reasonable suspicion of danger.

[64] These cases, while obviously not binding, provide helpful persuasive authority illustrating the need to establish different standards for searches of areas inside and outside the arrested person's physical control.

(ii) <u>The Nature of Reasonable Suspicion</u>

[65] When the police search incident to arrest in a home for safety purposes, they must have reason to suspect that a search of areas outside the physical control of the arrested person will further the objective of police and public safety, including the safety of the accused. This modified standard, which is stricter than the basic common

law standard, respects the privacy interests in the home while allowing the police to effectively fulfil their law-enforcement responsibilities.

[66] Like the common law test, the purpose of the search must be subjectively connected to the arrest, and the officer's belief that the purpose will be served by the search must be objectively reasonable. However, the objective requirement is stricter. To meet this stricter standard, the Crown must establish "objective facts [that] rise to the level of reasonable suspicion, such that a reasonable person, standing in the shoes of the police officer, would have held a reasonable suspicion" (*R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at para. 45).

[67] Reasonable suspicion is a higher standard than the common law standard for search incident to arrest. As this Court noted in *Caslake*, the search incident to arrest power arises from the fact of the lawful arrest (para. 13). All that is required is "some reasonable basis" for doing what the police did based on the arrest (para. 20). The common law standard is less stringent than the reasonable suspicion standard because it permits searches based on generalized concerns arising from the arrest, while the reasonable suspicion standard does not.

[68] By contrast, to establish reasonable suspicion, the police require a constellation of objectively discernible facts assessed against the totality of the circumstances giving rise to the suspicion of the risk. This assessment must be "fact-based, flexible, and grounded in common sense and practical, everyday experience" (*Chehil*, at para. 29). In addition, the police must have reason to suspect

that the search will address the risk. However, reasonable suspicion is a lower standard than reasonable and probable grounds because it is based on a *possibility* rather than a *probability* (*Chehil*, at para. 32).

[69] Whether the circumstances of a particular case give rise to reasonable suspicion must be assessed based on the totality of the circumstances (*Chehil*, at para. 26). Relevant considerations include (a) the need for a search; (b) the nature of the apprehended risk; (c) the potential consequences of not taking protective measures; (d) the availability of alternative measures; and (e) the likelihood that the contemplated risk actually exists (*R. v. Golub* (1997), 34 O.R. (3d) 743 (C.A.), at p. 758).

(iii) The Rationale for Reasonable Suspicion

[70] *Golub* provides helpful guidance on the rationale for the reasonable suspicion standard. That case involved the entry and search of a home incident to arrest. After making an arrest outside a residence, the police continued to suspect that there was another person inside the apartment with a loaded submachine gun. The Court of Appeal for Ontario, per Doherty J.A., held that where the place to be searched is a home, the general principles set out in *Cloutier* do not apply. Justice Doherty noted that this Court's decision in *Feeney* represented a shift in the law that gave greater protection to privacy interests in the home over law enforcement interests in most cases. He then reasoned that since warrantless arrests in a home are not generally permissible, similar reasoning should apply to warrantless searches of a home incident to arrest (pp. 755-56).

[71] Justice Doherty held that searches of a home incident to arrest should be "generally prohibited subject to exceptional circumstances where the law enforcement interest is so compelling that it overrides the individual's right to privacy within the home" (p. 756). The police must have "a reasonable suspicion, based on the particular circumstances of the arrest" (pp. 758-59) that they need to conduct the search to protect the safety of those at the scene of the arrest (p. 758).

[72] In *Golub*, the police *entered* the home to conduct a search incident to arrest, whereas here the police were already lawfully in the home under exigent circumstances when they conducted the search incident to arrest. Despite this difference, in our view, the principles which led the court in *Golub* to require a standard of reasonable suspicion apply equally here. Simply because the police have entered the home for a valid reason does not give them *carte blanche* to wander through the home at large where the circumstances do not call for it. As we have explained, the more extensive the warrantless search, the greater the potential for violating privacy. Thus, when the police search a home incident to arrest in areas outside the physical control of the arrested person at the time of arrest, they require reasonable suspicion.

[73] In concluding that reasonable suspicion applies to searches of a home incident to arrest, Doherty J.A. balanced the privacy interests in the home and the relevant police objectives. Given the factual matrix in *Golub*, he was particularly concerned about the police interest in protecting the safety of persons at the scene of

the arrest. In that regard, he made the following astute observations, with which we fully agree:

> . . . I am concerned with the police interest in protecting the safety of those at the scene of the arrest. This interest is often the most compelling concern at an arrest scene and is one which must be addressed immediately. In deciding whether the police were justified in taking steps to ensure their safety, the realities of the arrest situation must be acknowledged. Often, and this case is a good example, the atmosphere at the scene of an arrest is a volatile one and the police must expect the unexpected. The price paid if inadequate measures are taken to secure the scene of an arrest can be very high indeed. Just as it is wrong to engage in *ex post facto* justifications of police conduct, it is equally wrong to ignore the realities of the situations in which police officers must make these decisions. [Emphasis added; p. 757.]

[74] When assessing police conduct, the reviewing judge must be alive to the volatility and uncertainty that police officers face — the police must expect the unexpected. This reality is inherent in the police's exercise of their common law powers, as well as their statutory duties, including "the preservation of the peace, the prevention of crime, and the protection of life and property" (*R. v. Godoy*, [1999] 1 S.C.R. 311, at para. 15 (emphasis deleted), citing *Dedman v. The Queen*, [1985] 2 S.C.R. 2, at pp. 11-12; *Police Services Act*, R.S.O. 1990, c. P.15, s. 42). Given their mandate, "police officers must be empowered to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing" (*R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 16). A reasonable suspicion standard ensures that the police may carry out these duties, while also balancing the enhanced privacy in a person's home.

(iv) No Requirement for Reasonable Belief in Imminent Harm

[75] In adopting a reasonable suspicion standard, we reject Mr. Stairs' proposed standard of reasonable belief in imminent harm, which was endorsed by the dissenting judge at the Court of Appeal. Both Mr. Stairs and the dissenting judge relied on *MacDonald*. However, *MacDonald* is distinguishable.

[76] In that case, the police attended Mr. MacDonald's condominium in response to a noise complaint. When he partially opened the door to his unit, it appeared that he may have been holding a weapon behind his leg. After he refused to reveal what was behind his leg, the police pushed the door open further. Importantly, Mr. MacDonald was not under arrest. He therefore retained a strong expectation of privacy in his home and the police required heightened grounds to justify entry — i.e., a reasonable belief in imminent harm. In the present case, by contrast, the police had already entered the home under exigent circumstances and lawfully effected the arrest. Mr. Stairs' expectation of privacy was thus significantly diminished (*Fearon*, at para. 56, referencing *R. v. Beare*, [1988] 2 S.C.R. 387, at p. 413). To be clear, "[t]he authority for the search does not arise as a result of a reduced expectation of privacy of the arrested individual"; however, it is a factor in assessing the standard for a search incident to arrest (*Caslake*, at para. 17). It follows, in our view, that *MacDonald* is distinguishable.

[77] There are also independent reasons for rejecting a standard of reasonable belief in imminent harm for a home search incident to arrest. First, because a search

incident to arrest typically occurs at the early stages of an investigation, the police will often be unable to show reasonable and probable grounds. Setting the bar too high will prevent the police from acting promptly, taking *immediate* steps to address risks to their safety and the safety of others, including innocent bystanders. Second, an imminence requirement would practically proscribe the search incident to arrest power, as it would simply restate the exigency exception. If there were exigent circumstances, the police could act solely on that basis. There would be no need for the power to search incident to arrest.

(b) *Nature and Extent of the Search*

[78] The police must carefully tailor their searches incident to arrest in a home to ensure that they respect the heightened privacy interests implicated. The search incident to arrest power does not permit the police to engage in windfall searches. The police are highly constrained when they go beyond the area within the physical control of the arrested person.

[79] The search incident to arrest power only permits police to search the surrounding area of the arrest (*Cloutier*, at pp. 180-81; Coughlan, at p. 124). This Court's guidance on how to determine what constitutes the surrounding area of the arrest remains constant. As indicated, the key consideration is the link between the location and purpose of the search and the grounds for the arrest (*Nolet*, at para. 49).

[80] In addition, the nature of the search must be tailored to its specific purpose, the circumstances of the arrest, and the nature of the offence. As a general rule, the police cannot use the search incident to arrest power to justify searching every nook and cranny of the house. A search incident to arrest remains an exception to the general rule that a warrant is required to justify intrusion into the home. The search should be no more intrusive than is necessary to resolve the police's reasonable suspicion.

[81] Further, it would be good practice for the police to take detailed notes after searching a home incident to arrest. They should keep track of the places searched, the extent of the search, the time of the search, its purpose, and its duration. In some instances, insufficient notes may lead a trial judge to make adverse findings impacting the reasonableness of the search.

(4) The Applicable Framework

[82] In summary, a search of a home incident to arrest for safety purposes will comply with s. 8 of the *Charter* when the following requirements are met:

(1) The arrest was lawful.

(2) The search was incident to the arrest. The search will be incident to arrest when the following considerations are met:

(a) Where the area searched is within the arrested person's physical control at the time of the arrest, the common law standard must be satisfied.

(b) Where the area searched is outside the arrested person's physical control at the time of the arrest — but the area is sufficiently proximate to the arrest — the police must have reason to suspect that the search will further the objective of police and public safety, including the safety of the accused.

(3) Where the area searched is outside the arrested person's physical control at the time of the arrest — but the area is sufficiently proximate to the arrest — the nature and the extent of the search must be tailored to the purpose of the search and the heightened privacy interests in a home.

VI. Application

[83] Before this Court, Mr. Stairs does not question the lawfulness of his arrest or the validity of the initial pat-down search and scan of the laundry room. The outstanding issues are (a) whether the police had a reason to suspect that there were safety risks which justified the basement living room search; and (b) whether the search was conducted in a reasonable manner.

A. *Reasonable Suspicion*

[84] The living room search met the standard for reasonable suspicion, both in terms of its subjective and objective components.

(1) Subjective Component

[85] It was open to the trial judge to conclude that the police subjectively believed there was a safety risk that would be addressed by conducting a clearing search of the living room. This was a valid law enforcement purpose. The officer who conducted the clearing search (Officer Vandervelde) testified that the search was performed to ensure that "no one else was there", such as someone potentially posing a risk or needing assistance, and that there were "no other hazards", such as weapons or firearms sitting out in the open (see pre-trial application reasons, at para. 282).

(2) Objective Component

[86] It was equally open to the trial judge to find that it was objectively reasonable for the police to clear the area for hazards and other occupants. When assessing reasonableness, it is essential to properly contextualize the arrest and the surrounding circumstances. Here, the following factors figure prominently in the reason-to-suspect analysis: (a) the dynamic before and during the arrest; and (b) the nature of the offence for which Mr. Stairs was arrested.

(a) *The Dynamic of the Arrest*

[87] The situation was volatile and rapidly changing. The police were responding to a civilian 9-1-1 call. The caller reported that the male driver was

swerving on the road while repeatedly striking the female passenger in a "flurry of strikes". He continued hitting her, even though she was huddling to protect herself.

[88] Shortly thereafter, the police located the reported car parked in the driveway of an unknown home. Despite loudly and repeatedly announcing themselves, no one answered the door. They entered the home because they feared that the assault was ongoing. When the woman emerged from the living room in the basement, she had fresh injuries to her face, supporting the police officers' belief that she had been assaulted. Moreover, Mr. Stairs disobeyed repeated commands. He behaved erratically, running across the basement from the living room and barricading himself in the laundry room.

[89] From door knock to arrest, about four minutes elapsed. The situation was tense and the police had their weapons drawn. Throughout this interaction, the police also knew that Mr. Stairs had a history of violence, including domestic violence, that he was an escape risk, and that he had been identified as a high-risk offender.

(b) *The Nature of the Offence*

[90] The arrest was for domestic assault. As this Court recognized in *Godoy*, at para. 21, privacy in the home must be balanced with the safety of other members of the household:

> One of the hallmarks of [domestic violence] is its private nature. Familial abuse occurs within the supposed sanctity of the home. While there is no question that one's privacy at home is a value to be preserved and promoted, privacy cannot trump the safety of all members of the household. If our society is to provide an effective means of dealing with domestic violence, it must have a form of crisis response.

[91] For victims of domestic violence, the home is often not a safe haven. Instead, it is a place that shields and enables their abuse. While privacy interests in the home are important, s. 8 of the *Charter* "was not intended to protect blindly privacy interests claimed in the context of criminal activities which are played out within one's home" (*Silveira*, at para. 119, per L'Heureux-Dubé J., concurring). In domestic violence cases, the police are not only concerned with the privacy and autonomy of the person arrested; they must also be alert to the safety of all members of the household, including both known and potential victims.

[92] Historically, victims of domestic violence did not receive the help they needed. Domestic conflicts were considered "private" matters that did not warrant state intervention. More recently, "the courts, legislators, police and social service workers have all engaged in a serious and important campaign to educate themselves and the public on the nature and prevalence of domestic violence" (*Godoy*, at para. 21). And yet, despite these advances, domestic violence persists. It remains one of the most prevalent crimes in Canada, accounting for more than a quarter of all violent crimes. In 2019, there were about 400,000 victims of violent crime reported to the police. Of these, 26 percent — over 100,000 people — were victimized by a family member

(Statistics Canada, *Family violence in Canada: A statistical profile, 2019* (March 2021), at p. 4).

[93] Moreover, cases involving domestic violence are often emotionally charged and volatile (*Jensen v. Stemmer*, 2007 MBCA 42, 214 Man. R. (2d) 64, at para. 98; L. Ruff, "Does Training Matter? Exploring Police Officer Response to Domestic Dispute Calls Before and After Training on Intimate Partner Violence" (2012), 85 *Police J.* 285). Domestic dispute calls can be dangerous and even life-threatening for responding officers and persons at the scene (*R. v. Dodd* (1999), 180 Nfld. & P.E.I.R. 145 (N.L.C.A.), at para. 38). Given the prevalence of domestic violence and its attendant risks, responding police officers must have the ability to assess and control the situation. In this case, that included confirming whether other individuals or hazards were in the surrounding area of the arrest.

[94] The police often respond to domestic violence calls with limited information. For example, they may not know if other family members, including children, are involved. This is further exacerbated when victims at the scene of the arrest are uncooperative, a common phenomenon in the domestic violence context. For example, in *R. v. Lowes*, 2016 ONCA 519, the police responded to a 9-1-1 call in which a neighbour reported hearing a man threaten to kill a woman. The woman insisted to the police that no one else was in the apartment. The Court of Appeal found that the police would have been "derelict in their duty" had they accepted the woman's response at face value (para. 12 (CanLII)).

[95] A similar situation played out here. Despite fresh and visible injuries, the victim claimed that she and Mr. Stairs were just play fighting. This was not credible, given the nature of her injuries and since a civilian had witnessed an assault so violent that he reported his observations to 9-1-1. Moreover, Officer Brown testified that based on his conversation with the victim, he believed that she "didn't want to co-operate" (A.R., vol. II, at p. 49). Importantly, the police could not depend on her for reliable information about the presence of other people, other hazards, or the cause of her injuries, and there was no one else they could turn to for such information. It was thus objectively reasonable for the police to engage in a cursory search of the surrounding area of the arrest, including the basement living room.

[96] Our colleague Justice Karakatsanis maintains that the police acted on generalized suspicion, as opposed to reasonable suspicion. With respect, we disagree. In assessing whether the conduct of the police was objectively reasonable in the circumstances of this case, we are reminded of the invaluable insight provided by Doherty J.A. in *Golub*, at p. 757: in volatile circumstances where the police must expect the unexpected, it is "wrong to ignore the realities of the situations in which police officers must make these decisions". While it is critical that the line between generalized suspicion and reasonable suspicion be maintained, in cases like the present one, we must assiduously avoid using twenty-twenty hindsight as the yardstick against which to measure instantaneous decisions made by the police.

[97] Although privacy interests in the home are important, they are not absolute. On the facts of this case, it was open to the trial judge to conclude that society's interest in effective law enforcement should prevail over Mr. Stairs' privacy interest in the basement living room. The trial judge did not err in concluding that it was objectively reasonable for the police to check the area to ensure that no other people (including potential victims) were present and no weapons or hazards were sitting out in the open.

B. *Nature and Extent of the Search*

[98] The search was conducted reasonably. It took place right after the arrest and the police merely conducted a visual scan of the living room area to ensure that no one else was present and that there were no weapons or hazards.

[99] The spatial scope of the search was appropriate. The trial judge's finding of fact that the living room was part of the surrounding area of the arrest reveals no error. The police appropriately limited the scope of their search. Had they searched the upper floors of the home or other rooms, the search would have been unreasonable. But they did not do so. They only cleared the basement living room area immediately adjacent to where Mr. Stairs had been arrested — the very area from which he and the victim had emerged just moments earlier.

[100] Moreover, the police searched what appeared to be a common living room space. There was nothing about that space to suggest that a higher than normal expectation of privacy in the context of a home was warranted, such as one might

reasonably expect in a bedroom. While it was revealed at trial that Mr. Stairs used the basement living room area as his main living space, at the time of the search there was no indication that it was being used as a bedroom. Nor was the basement a separate apartment unit from the rest of the house.

[101] Finally, the police engaged in the most cursory of searches. They did a brief visual scan to see if anyone else or obvious weapons or hazards were in the area. They did not move any items or open doors or cupboards, which would not have been permissible in this case. Given their objective, the search was the least invasive possible.

[102] Counsel for Mr. Stairs submitted that if the applicable standard for a search incident to arrest in a home is modified to require reasonable suspicion, then she took "no issue with the applicability of the plain view doctrine" (transcript, at p. 19). Because this Court did not have the benefit of any submissions on this issue, we leave for another day the important question of whether and how the common law plain view doctrine applies in the context of a search incident to arrest in a home. Given the concession on this record, and the findings of the trial judge, we would not disturb her conclusion that the seizure was authorized.

VII. Disposition

[103] For the reasons set out above, the search of the living room incident to arrest did not violate Mr. Stairs' s. 8 *Charter* right against unreasonable search and

seizure. The police had reason to suspect that there was a safety risk which would be addressed through a cursory visual clearing search. Moreover, the search was tailored to its purpose — it was targeted, brief, and constrained. The evidence from the living room search was therefore properly admitted at trial. Accordingly, we would dismiss the appeal.

The reasons of Karakatsanis, Brown and Martin JJ. were delivered by

KARAKATSANIS J. —

I. Overview

[104] Responding to a domestic violence call, police arrested Matthew Stairs in his home, searched his basement, and, in a discovery unrelated either to the nature of the arrest or the aim of the search, seized methamphetamine that was found behind a couch and next to a coffee table. Mr. Stairs was later charged with drug possession for the purpose of trafficking. The majority concludes that the police's warrantless search and seizures complied with s. 8 of the *Canadian Charter of Rights and Freedoms*. I disagree.

[105] A home is not only shelter — it is a personal refuge and a trove of personal information. It occupies a unique place in s. 8's protections from unreasonable searches and seizures. Indeed, there is "no place on earth where persons can have a greater

expectation of privacy" (*R. v. Silveira*, [1995] 2 S.C.R. 297, at para. 140). But privacy is not absolute, and must sometimes yield to competing law enforcement objectives. The question in this case is how to balance the two when police lawfully enter a home without a warrant, make an arrest, and seek to conduct a search incident to that arrest. Does the *Charter* require that special restrictions apply?

[106] The question turns on the application of the common law search incident to arrest doctrine, which ordinarily entitles police to search the person arrested and their immediate surroundings for safety purposes, to preserve evidence from destruction, or to discover evidence that could be used at trial. The power is unusual because, as the authority to search derives from the arrest, it authorizes warrantless searches without the need for reasonable grounds or even reasonable suspicion. Instead, police must only have "some reasonable basis" for the search (*R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 20).

[107] Like my colleagues, I conclude that the common law sets too low a bar for searches incident to arrest inside a home. Privacy demands more. When officers seek to search a home for safety purposes — as they did here — the appropriate standard is reasonable suspicion of an imminent threat to police or public safety.

[108] Applied to this case, I conclude that the search and seizures were not justified. The police only searched the basement once Mr. Stairs had been handcuffed and the victim had gone upstairs, and absent any sign of weapons or other people. The searching officer gave no basis to ground a reasonable suspicion that anybody's safety

was at risk following Mr. Stairs' arrest. The search and seizures were therefore unlawful and violated Mr. Stairs' s. 8 rights. I would exclude the evidence under s. 24(2), set aside Mr. Stairs' conviction, and enter an acquittal.

II. Facts

[109] Responding to a 9-1-1 call from a civilian who witnessed a driver assaulting his female passenger, Officers Brown, Vandervelde, and Martin found the car at a residential address and ran the licence plate. The car was associated with Matthew Stairs, an individual who carried cautions for escape risk, violence, and family violence. Receiving no answer at the front door, the officers looked through windows and, seeing nobody in the house, entered through an unlocked side door. On the main level, no lights were on, but they could see light and heard music coming from the basement. Officer Vandervelde saw Mr. Stairs run across the bottom of the stairwell and a woman emerged from the basement with her hands up, displaying fresh facial injuries. While Officer Martin attended to the woman upstairs, Officers Brown and Vandervelde entered the basement with weapons drawn and eventually coaxed Mr. Stairs out of the laundry room, where he had barricaded himself. Officer Brown arrested and searched him, finding only money on his person. Officer Vandervelde then did a "sweep" of the basement and, about 10 feet from the arrest, saw a transparent Tupperware container on the floor behind a couch, containing what looked like crystal methamphetamine. A ziplock bag next to a coffee table also appeared to contain

methamphetamine. Police seized both items and also arrested the injured woman for drug possession.

[110] Mr. Stairs was charged with possession of a controlled substance for the purpose of trafficking, and challenged the admissibility of the drugs under s. 8 of the *Charter*. The trial judge dismissed his application, holding that police had lawfully arrested him, lawfully searched incident to arrest, and lawfully seized the evidence under the plain view doctrine (2018 ONSC 3747, 412 C.R.R. (2d) 95 (pre-trial application reasons)). A majority at the Ontario Court of Appeal agreed, holding that the search was authorized as a search incident to arrest, and the seizures of evidence were lawful under the plain view doctrine (2020 ONCA 678, 153 O.R. (3d) 32). Justice Nordheimer, dissenting, would have held that the search failed to satisfy the standard of "objectively verifiable necessity" for a warrantless search of a home (*R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, at para. 31). Mr. Stairs appeals to this Court as of right.

III. Analysis

[111] My reasons proceed in three parts. First, I consider the search incident to arrest power, and conclude that it authorizes a search where the officer reasonably *suspects* an imminent threat to police or public safety. Second, I consider the application of that standard to the evidence of this case, and conclude that the search and seizures were unlawful, and thus unconstitutional. Lastly, I consider s. 24(2) of the *Charter* and conclude that the evidence should be excluded and the appeal allowed.

A. *The Power to Search Incident to Arrest*

(1) Section 8 of the *Charter*

[112] Section 8 of the *Charter* confers the right "to be secure against unreasonable search or seizure". A search or seizure is only reasonable, and thus constitutional, when (1) it is authorized by law; (2) the law itself is reasonable; and (3) the search or seizure was carried out reasonably (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278). The scope of the right is determined by the underlying balance s. 8 strikes between privacy interests and legitimate law enforcement objectives (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60).

[113] Like other *Charter* rights, s. 8 is a restraint on state power; it "is not in itself an authorization for governmental action" (*Hunter*, at p. 156). In *Hunter*, the Court held that prior judicial authorization — a warrant — is a precondition to a valid search or seizure, failing which the search or seizure would be presumptively unconstitutional (p. 161). In entrusting the authorization to search to a judicial arbiter on a standard of reasonable and probable grounds, the warrant requirement "puts the onus on the state to demonstrate the superiority of its interest to that of the individual" and serves as a "means of preventing unjustified searches before they happen" (*Hunter*, at p. 160 (emphasis in original)).

[114] The warrant requirement is a foundational check on police powers, and a cornerstone of our constitutional order. Any exceptions should be "exceedingly rare"

(*R. v. Simmons*, [1988] 2 S.C.R. 495, at p. 527; *R. v. Grant*, [1993] 3 S.C.R. 223, at p. 239). Still, obtaining a warrant is not always feasible. In exigent circumstances — often defined as an imminent threat to police or public safety, or a risk of the imminent loss or destruction of evidence — the police may be authorized to search or seize evidence without one (*Criminal Code*, R.S.C. 1985, c. C-46, s. 487.11; *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 52). Such exceptions are justified not by diminished privacy interests, but by the pressing law enforcement objectives that overtake them when critical situations arise.

(2) Common Law Power to Search Incident to Arrest

[115] The police power to search incident to arrest is another common law exception to the warrant requirement. It is available where (1) the individual has been lawfully arrested; (2) the search is "truly incidental to the arrest in the sense that it is for a valid law enforcement purpose related to the reasons for the arrest"; and (3) the search is conducted reasonably (*R. v. Saeed*, 2016 SCC 24, [2016] 1 S.C.R. 518, at para. 37). Its authority derives from the arrest itself; there is no independent need for reasonable and probable grounds (*Caslake*, at para. 13).

[116] The power is not unbounded. It only allows police to search the arrestee's person and "to seize anything in his or her possession or immediate surroundings" (*Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 180). And the "truly incidental to arrest" criterion requires two things. First, the search must relate to a valid law enforcement objective — protecting police or public safety, protecting evidence from

destruction, or discovering evidence which could be used at trial — and must be subjectively and objectively reasonable in the circumstances (*Caslake*, at paras. 19 and 21). Second, the search must remain proximate in space and time to the arrest (*Caslake*, at para. 25). It is, in short, a "focussed power", whose scope turns on the "particular circumstances of the particular arrest" (*R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at paras. 13 and 16). The objectives and scope of the search will depend on the nature of the offence and the circumstances of the arrest (*Caslake*, at para. 25).

[117] Notwithstanding the power's limitations, the Court has remained cautious to prevent its overreach. The search incident to arrest power is an "extraordinary" one, not only because it permits warrantless searches, but because it may do so "in circumstances in which the grounds to obtain a warrant do not exist" (*Fearon*, at para. 16). In some cases, the Court has modified or tailored the common law framework to account for particularly compelling individual interests, restricting seizures of hair, buccal swabs, and teeth impressions (*R. v. Stillman*, [1997] 1 S.C.R. 607); strip searches (*R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679); cell phone searches (*Fearon*); and penile swabs (*Saeed*). The issue in this case is whether the strong privacy interests in a home also call for modifications to the exercise of this common law power.

(3) Searches in a Home

[118] To answer that question, s. 8 requires that the privacy interests in a home and law enforcement interests be balanced.

(a) *Privacy Interests*

[119] For centuries, the law has recognized that every person's home is their sanctuary (*Eccles v. Bourque*, [1975] 2 S.C.R. 739, at p. 743). Long a central restraint on state intrusions, the legal status of privacy in one's home "significantly increased in importance with the advent of the *Charter*" (*Feeney*, at para. 43). Today, there is no doubt that individuals have strong privacy interests in a home (*Silveira*, at para. 140; *Feeney*, at para. 43; *R. v. Godoy*, [1999] 1 S.C.R. 311, at para. 19; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 22; *MacDonald*, at para. 26; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 46; *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531, at para. 24). And this is true not only of arrested persons, but of other occupants, including in areas or items under shared control (*Reeves*, at para. 37). However brief or circumscribed, police searches in homes threaten those compelling and comprehensive privacy interests and the interests that underlie them — dignity, integrity and autonomy (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293) — all of which are vital to human flourishing.

[120] My colleagues recognize that the privacy interests in a home are high (para. 49). But unlike them, I find it unhelpful to compare privacy in a home to a strip search or obtaining bodily samples (para. 51). Privacy interests come in different forms — whether personal, territorial, or informational (*Tessling*, at para. 20) — which are not easily equated. The focus in tailoring the common law framework is to reconcile the specific privacy interests at issue with the specific law enforcement interests that

counterbalance them. Whether a search of a home could be more or less invasive than body, cellphone or car searches is, in this respect, tangential; the key questions are when and how the undoubtedly strong privacy interests in a home ought to yield to varying policing objectives.

[121] Put simply, a home is the setting of individuals' innermost lives: at once a shield from the outside world and a biographical record, its sanctity is indispensable. Without it, personal privacy, dignity, integrity and autonomy would suffer. The high weight placed on a person's security in their home, then, stands as a "bulwark" of protection, which "affords the individual a measure of privacy and tranquillity against the overwhelming power of the state" (*Silveira*, at para. 41, per La Forest J., dissenting, but not on this point).

(b) *Law Enforcement Objectives*

[122] While privacy interests in a home are significant, so too are the interests in protecting police and public safety. Police must be able to address the hazards that may arise in unfamiliar, and potentially hostile, environments, not least when investigating volatile offences like domestic violence. The cost of inadequate measures to protect safety "can be very high indeed", and it would be unreasonable to "ask the police to place themselves in potentially dangerous situations" without equipping them to take reasonable defensive steps (*R. v. Golub* (1997), 34 O.R. (3d) 743 (C.A.), at p. 757). Depending on the circumstances of the arrest, police may also need to assist others on the scene, including children.

[123] To be sure, the law enforcement interests engaged by home searches in the domestic violence context may cut both ways. Police searches may revictimize victims or uncover evidence of unrelated offences, which may discourage individuals from reporting. That is a particular concern in domestic violence, one of whose "hallmarks" is its private nature (*Godoy*, at para. 21). Again, this case is illustrative: shortly after arresting Mr. Stairs, police arrested the victim herself for drug possession. Victims of domestic violence are often reluctant to seek police assistance and reluctant to cooperate when police arrive. Overly broad search powers can only compound that reluctance.

[124] Still, both sides of the scale carry significant weight when police encounter safety concerns in a home. While the nature of privacy interests in a private home usually justifies a higher threshold, safety concerns pull strongly in the other direction. Clearly, a right to search on a "reasonable basis" alone would give little effect to the powerful privacy interest. Yet a search power couched in undue restrictions could imperil police or the public. Balancing the two objectives under s. 8, I agree that reasonable suspicion is an appropriate standard for searches based on safety, where police believe there may be an imminent threat to the police or others.

[125] In reaching this conclusion, it follows that I would reject the submissions of Mr. Stairs, and the conclusion of the dissenting justice below (at paras. 76-78) that s. 8 requires a standard of reasonable belief in imminent harm in this context. But although I agree with my colleagues that reasonable belief — that is, reasonable and

probable grounds (*Baron v. Canada*, [1993] 1 S.C.R. 416, at pp. 446-47) — sets too high a bar, I do not agree that the requirement that a safety risk be imminent should be rejected (Moldaver and Jamal JJ.'s reasons, para. 77). The safety risks that arise from an arrest in a home, for which a warrant cannot feasibly be procured, will generally be imminent. While this requirement may indeed overlap or "restate the exigency exception" (para. 77), consistency with other legal standards is not a reason to define this one more expansively. Imminence is a useful concept because it defines those circumstances where obtaining a warrant is not feasible. It signals that if police can get a warrant before searching a home, they should do so.

(c) *Summary*

[126] In sum, the strong privacy interests in a home call for modifying the common law standard for search incident to arrest when the arrest occurs in a home. That balance is best struck by authorizing police to conduct a search incident to arrest when they reasonably *suspect* there is an imminent threat to the safety of police or the public. As it was not argued, I would leave for another day the question of whether searches for evidence inside a home incident to arrest are permissible under s. 8.

(4) The Reasonable Suspicion Standard

[127] I agree with my colleagues' overview of the reasonable suspicion standard. Some points, however, warrant emphasis.

[128] While reasonable suspicion is a relatively low threshold imposed by the courts to meet s. 8 of the *Charter*, it still requires the officers to articulate some basis to suspect safety may be at risk. As in other searches incident to arrest, they must have both subjective *and* objective grounds for the search (*Caslake*, at para. 21). And those grounds must correspond — officers "cannot rely on the fact that, objectively, a legitimate purpose for the search existed when that is not the purpose for which they searched" (*Caslake*, at para. 27). The court's task is to examine the evidence of the *actual* reasons for the search — and not whether reasonable suspicion could have justified the search.

[129] In *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, the Court outlined several principles to guide the reasonable suspicion standard's application. As my colleagues note, reasonable suspicion:

- is "based on objectively discernible facts, which can then be subjected to independent judicial scrutiny [that] is exacting, and must account for the totality of the circumstances" (*Chehil*, at para. 26);

- is a higher standard than "mere suspicion" but lower than reasonable and probable grounds — it engages "reasonable possibility, rather than probability" (paras. 26-27, citing *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, at para. 75); and

- is "fact-based, flexible, and grounded in common sense and practical, everyday experience" (para. 29).

[130] My colleagues also explain that reasonable suspicion does not permit searches "based on generalized concerns arising from the arrest" (para. 67). Indeed, in *Chehil* the Court was clear that an "exacting" review of the basis for a search must be tied to the specific facts in question. Citing the need for "a sufficiently particularized constellation of factors", the Court explained that a "constellation of factors will not be sufficient to ground reasonable suspicion where it amounts merely to a 'generalized' suspicion" (para. 30). And while recognizing the importance of officer training and experience in the assessment, it cautioned against allowing those factors to overwhelm the inquiry:

> An officer's training and experience may provide an objective experiential, as opposed to empirical, basis for grounding reasonable suspicion. However, this is not to say that hunches or intuition grounded in an officer's experience will suffice, or that deference is owed to a police officer's view of the circumstances based on her training or experience in the field . . . . A police officer's educated guess must not supplant the rigorous and independent scrutiny demanded by the reasonable suspicion standard. [Emphasis added; citation omitted; para. 47.]

[131] I agree with my colleagues that the factors enumerated in *Golub* in the context of a safety search — including the "nature of the apprehended risk, the potential consequences of not taking protective measures, the availability of alternative measures, and the likelihood of the contemplated danger actually existing" (*Golub*, at p. 758) — are a helpful guide to assessing when a risk will give rise to reasonable

suspicion. Ultimately, the task for the courts is, in each case, to apply the standard in light of the specific evidence before them, focusing on the reasons actually relied on by the officer. When the police lack a sufficient justification for a search, it is not the role of the Crown or the judge to supply one after the fact. The issue is whether the search was constitutional at the time it was carried out.

(5) The Scope of Safety Searches Inside a Home

[132] Alongside the reasonable suspicion standard, the permissible scope of a search serves as another limitation on the police's ability to conduct a search incident to arrest inside a home. This constrains searches in two ways: by the nature of the concerns animating the arrest, and by the need for temporal and spatial proximity between the search and the arrest.

[133] Just as the authority for a search incident to arrest derives from the arrest itself, a "search is only justifiable if the purpose of the search is related to the purpose of the arrest" (*Caslake*, at para. 17; see also para. 13). An arrest that only gives rise to safety concerns cannot, without more, authorize a search for matters unrelated to safety — in an arrest for traffic violations, for instance, "once the police have ensured their own safety, there is nothing that could properly justify searching any further" (*Caslake,* at para. 22). Similarly, a warrantless arrest in a home that leads officers to reasonably suspect a need to neutralize threats, or to locate and assist victims, only allows them to conduct a search consistent with those particular concerns. There must be a purposive link to the nature of the arrest.

[134] A search that falls within those parameters must also be spatially and temporally proximate to the arrest. An arrest cannot lead the police too far afield. Spatially, this Court has said the items or places searched must fall within the "immediate surroundings" of the arrest (*Cloutier*, at p. 180). And although this Court has resisted setting "strict limit[s] on the amount of time that can elapse between the time of search and the time of arrest", police must, depending on the facts, conduct the search "within a reasonable period of time after the arrest" (*Caslake*, at paras. 16 and 24). Obviously, these limits are particularly important in a home.

[135] I would not adopt, as my colleagues do, the American distinction between "areas inside and outside the arrested person's physical control" (paras. 62-64). In our jurisprudence a search incident to arrest has always been framed as the authority to search the person arrested and their immediate surroundings. In defining where the modified framework applies inside a home, I would distinguish between the arrestee's person and their immediate surroundings. This is because a search of an arrestee's person (the ubiquitous "frisk" search) does not implicate their privacy interests *in the home* — they have the same personal privacy interests at home as in public. Areas beyond their person, however, engage broader territorial and informational interests which, in a home, are significant. The distinction based on a zone inside the arrested person's control was not argued, its adoption is unnecessary, and it complicates the search incident to arrest framework.

[136] In rare situations where safety concerns arise independently from the arrest, other doctrines may also apply. The common law police duty to protect life and safety, for instance, may justify police in carrying out a warrantless safety search in circumstances of "objectively verifiable necessity" (*MacDonald*, at paras. 40-41). But those searches, too, cannot be "unbridled" (para. 41). They too must be conducted in a manner that reflects their purpose, namely to do what is "reasonably *necessary*" to allay the apprehended threat (para. 47 (emphasis in original)).

[137] Clearly, not all safety concerns are alike. As with determining whether the reasonable suspicion standard has been satisfied, the scope of a search will depend on a particularized assessment of the facts before the police. But given that searches incident to arrest inside a home require an imminent safety risk, their scope will, in my view, often be limited. This is consistent with the power's exceptional status under s. 8. Though "an invaluable tool in the hands of the police", searches incident to arrest "inevitably intrude on an individual's privacy interests" (*Saeed*, at para. 1). They should intrude no more than necessary. In a home more than anywhere else, it ought to remain a "focussed power" (*Fearon*, at para. 16).

B. *Application*

[138] Applied to this case, I conclude that the search and the seizures fell outside the scope of the common law police powers and were therefore unconstitutional.

[139] Officer Vandervelde, the officer who discovered the drugs, searched Mr. Stairs' basement to identify hazards or other people — that is, for safety. There is thus no dispute that police had "one of the purposes for a valid search incident to arrest in mind when the search [was] conducted" (*Caslake*, at para. 19). The question is whether the search — which turned up evidence that was unrelated to the reasons for the arrest or the nature of the search — was subjectively and objectively reasonable on the standard of reasonable suspicion.

[140] The trial judge's reasoning on this point was brief. Applying the unmodified common law search incident to arrest framework, she concluded that the search was both subjectively and objectively reasonable:

> The search had a valid objective. Vandervelde testified that he searched to make sure no one else was there and that there were no other hazards. This is reasonable. Both the male and the female had come from the living room area. Neither Brown nor Vandervelde could see fully into the living room as they descended the stairs. The quick sweep as they descended the stairs did not fully address safety concerns. As set out above, there were parts of the living room they could not see. [para. 282]

[141] The majority at the Court of Appeal reached the same conclusions:

> In the end, the police were able to articulate why they had safety concerns. That articulation made sense. They had descended into a basement where they had never been before, in a house they had never been in before. While the 9-1-1 caller said that there were two people in the car that he observed, that did not mean there were only two people in the home. Nor did it mean that there were no other safety concerns hiding around corners.

> In particular, the police could not see behind the sofa from the doorway to the living room. It was not unreasonable to take a quick visual scan of the room in the circumstances. They had a person in handcuffs and needed to ascend the stairs, which were located right beside the living room, to safely get him out of the residence, all while the female remained on the first floor. The fact that the methamphetamine was sitting out in plain view meant that it could be seized. [paras. 67-68]

[142] My colleagues find that it was "open to the trial judge to conclude that the police subjectively believed there was a safety risk", since the officers testified they searched to ensure no other people or hazards were present (para. 85). And they explain that the search was objectively reasonable for two main reasons. First, the dynamic before and during the arrest was "volatile and rapidly changing" (para. 87). The police entered the home fearing the assault was ongoing, encountered the victim with "fresh injuries to her face" (para. 88) and entered the basement with weapons drawn (para. 89). Meanwhile, Mr. Stairs — who police knew had a history of violence — disobeyed police commands and "barricad[ed] himself in the laundry room" (para. 88). Second, police arrested Mr. Stairs for domestic violence, an offence whose private nature can, perversely, turn the privacy in a home to the abuser's advantage (para. 91). Its prevalence, the safety risks it poses, and the factual uncertainties at the scene, mean police "must have the ability to assess and control the situation" (para. 93). Police could not rely on the victim, who denied an assault had occurred and was reluctant to cooperate. Taken together, "it was open to the trial judge to conclude that society's interest in effective law enforcement should prevail over Mr. Stairs' privacy interest in the basement living room" (para. 97).

[143] I cannot agree with this analysis.

[144] As I have explained, courts assessing the reasonableness of a police search must determine whether the officer's own grounds for the search were reasonable. Only those subjective grounds may be considered; courts "cannot rely on the fact that, objectively, a legitimate purpose for the search existed when that is not the purpose for which they searched" (*Caslake*, at para. 27).

[145] The subjective basis for the officers' search must be found in the evidence of the officer conducting the search. Officer Vandervelde testified as follows when asked what happened after Mr. Stairs' arrest:

> . . . so once he was in handcuffs and I felt it was safe, I proceeded through the basement, make sure there's no other obvious threats, any other people in that basement.
>
> . . .
>
> Never really know exactly what you're looking for when you're entering a house in a situation like this, so whether there's firearms sitting out, like I said, other people that could be in the basement. [Emphasis added.]
>
> (A.R., vol. II, at pp. 212-13)

[146] He later expanded on this answer:

> Q. . . . So in terms of clearing the basement, as opposed to getting a search warrant what is the importance or significance of having to go through that clearing process?

A. Mostly just to ensure my safety and other officers' safety that are on the scene.

Q. What sort of risks are presented if you don't clear an area?

A. Other persons could be hiding in the basement; potential unsafely stored firearms or weapons, *et cetera*, you never really know what kind of hazards could be down there. [Underlining added.]

(A.R., vol. II, at p. 229)

[147] As I have explained, to satisfy the reasonable suspicion standard, the evidence must be "sufficiently particularized"; the search cannot rest on generalities, hunches, intuition or educated guesses (*Chehil*, at paras. 30 and 47). But here the officer, at best, expressed a generalized concern about weapons or people that might be found "in a situation like this". He admitted he "felt it was safe" and you "[n]ever really know exactly what you're looking for". His evidence gave no basis to suggest he suspected that other assailants, victims, or weapons were present. As a rationale, "you never really know" could apply any time the police make an arrest in a home. It is not a constitutionally acceptable reason to search in a private home; subjectively, the reasonable suspicion standard was not met.

[148] Nor was this subjective justification objectively reasonable. I note the following:

- Although the search of Mr. Stairs' licence plate generated cautions for violence and family violence, there was no mention of weapons

in the police dispatch, and nothing to suggest Mr. Stairs possessed any (pre-trial application reasons, at paras. 36, 76, 101 and 157).

- Officers Brown and Vandervelde visually scanned the basement when they entered. Although they could not see the entire area, that scan satisfied them that they could turn their backs and focus on drawing Mr. Stairs out from the laundry room (paras. 58, 128 and 281).

- Officer Brown found no weapons on Mr. Stairs (at para. 60) and had "no observations from the scene that anyone was in danger" (para. 50).

- Officer Vandervelde only conducted the search "once [Mr. Stairs] was in handcuffs and [he] felt safe", at a time when the victim was upstairs and in the company of Officer Martin (para. 89).

- Although the officers knew that Mr. Stairs' father lived at the home, they never saw any signs of people aside from Mr. Stairs and the victim, and never asked either of them whether anyone else was present (paras. 55, 71, 81-84, 119 and 166-67).

[149] There were, in sum, no particularized facts to justify a safety search, only generalized uncertainty about the presence of weapons or other people. But with

Mr. Stairs in handcuffs, the victim upstairs with Officer Martin, and no sign of weapons or other people, there was, quite simply, no apparent safety threat. That is not objectively reasonable suspicion.

[150] As the search was neither subjectively nor objectively reasonable, I conclude it was unlawful.

[151] Given that conclusion, there is no need to consider whether the seizures of the drugs were justified under the plain view doctrine. The question of whether and how the plain view doctrine applies inside a home has twice been raised, but not addressed, by this Court (*Godoy*, at para. 22; *Reeves*, at para. 25). Since the point was not argued before us, I would decline to do so here.

[152] As a result, I conclude the search and the seizures of the evidence infringed Mr. Stairs' s. 8 rights.

C. *Section 24(2) and Disposition*

[153] The question becomes whether the evidence ought to be excluded under s. 24(2) of the *Charter*, in that its admission "would bring the administration of justice into disrepute". Three lines of inquiry guide the analysis: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 (*Grant (2009)*), at para. 71).

[154] As I would reach a different conclusion on the existence of a *Charter* violation, no deference is owed to the trial judge's alternative conclusions on this point (*R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 138).

[155] First, the seriousness of the *Charter*-infringing state conduct is assessed along a spectrum of culpability running from "inadvertent or minor violations" to "wilful or reckless disregard of *Charter* rights" (*Grant (2009)*, at para. 74; see also *Le*, at para. 143). In my view, the state conduct in this case falls on the higher end of that spectrum. It was well known that private homes attract a high privacy interest and generally cannot be searched without a warrant. To be sure, the officers cannot be faulted for not applying the legal framework adopted in this appeal, of which they had no notice. But that does not excuse their conduct, given the longstanding importance the law has accorded to privacy in this context. In searching Mr. Stairs' basement without reasonable justification, the searching officer disregarded his strong privacy interest. And contrary to the trial judge's finding (pre-trial application reasons, at para. 292), he cannot be taken to have acted in good faith, since he did not act "consistent[ly] with what [he] subjectively, reasonably, and non-negligently believe[d] to be the law" (*Le*, at para. 147). In the circumstances, this inquiry favours exclusion.

[156] Second, since his privacy interests inside his home were significant, the unlawful search and seizures were a major incursion on Mr. Stairs' *Charter*-protected interests. This inquiry strongly favours exclusion.

[157] Lastly, the drugs were highly reliable evidence that was central to the Crown's case. The third inquiry pulls strongly in favour of inclusion.

[158] When the first two inquiries together make a strong case for exclusion, "the third inquiry will seldom if ever tip the balance in favour of admissibility" (*Le*, at para. 142). Weighing all three, I conclude that admitting the evidence would bring the administration of justice into disrepute. I would find the evidence inadmissible. I would therefore allow the appeal, set aside Mr. Stairs' conviction for possession of a controlled substance for the purpose of trafficking, and enter an acquittal.

The following are the reasons delivered by

CÔTÉ J. —

I. Overview

[159] There is agreement with my colleague Karakatsanis J. on the reasonable suspicion standard for searches incidental to arrest inside a home. I also agree with her application of this standard to the facts of this case. I, too, conclude that the search and seizure of the evidence infringed Mr. Stairs' rights pursuant to s. 8 of the *Canadian Charter of Rights and Freedoms*.

[160] However, I must respectfully part ways with my colleague on the proper disposition of the appeal under s. 24(2) of the *Charter*. As I will explain, I would not exclude the unlawfully seized evidence. In the exceptional circumstances of this case, I would adopt the trial judge's alternative conclusion that admitting the evidence would not bring the administration of justice into disrepute.

II. Section 24(2) Analysis

[161] I note at the outset that the trial judge found no breach, and thus her s. 24(2) analysis was conducted in the alternative. In this scenario, while the trial judge's *conclusion* is not entitled to deference on appeal, her *findings of fact* related to s. 24(2) are (*R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at para. 90; *R. v. Pileggi*, 2021 ONCA 4, 153 O.R. (3d) 561, at para. 97; *R. v. Kelsy*, 2011 ONCA 605, 280 C.C.C. (3d) 456, at para. 60, per Rosenberg J.A.). In any event, and according due deference to the trial judge's factual findings, I reach the same conclusion. I would decline to exclude the drug evidence seized as a result of the unlawful search.

A. *Seriousness of the Charter-Infringing Police Conduct*

[162] Although I have reservations about the officers' conduct in this case, I conclude that the first factor set out in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, favours admission.

[163] As my colleague Karakatsanis J. reaffirmed in *R. v. Saeed*, 2016 SCC 24, [2016] 1 S.C.R. 518, at para. 126 (concurring in the result), "where the police act on a mistaken understanding of the law where the law is unsettled, their *Charter*-infringing conduct is considered to be less serious" (citing *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at paras. 86-87; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at paras. 69 and 71; see also *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 77; *Fearon*, at para. 93; S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. (loose-leaf)), at §19:40).

[164] I therefore accept the Crown's submission that the seriousness of the infringement in this case is attenuated by the uncertainty of the law regarding residential searches incident to arrest at the relevant time. Indeed, it appears this is the first time this Court has considered the search incident to arrest power applied inside a home. Disagreement among the members of this Court and those of the Court of Appeal on the proper standard for and permissible scope of post-arrest residential safety searches illustrates the legal grey area in which police were operating. If a dozen distinguished jurists cannot agree on the applicable law, how can we expect these officers to have understood and properly applied it on the fly? In my respectful view, as in *Vu*, at para. 71, "[g]iven the uncertainty in the law at the time and the otherwise reasonable manner in which the search was carried out", the seriousness of the police misconduct in this case was at the lowest end of the spectrum.

[165] I would add that the trial judge in this case found as a fact that the police acted in "good faith" at all times during this "dynamic" arrest and search, believing their conduct was authorized by law (2018 ONSC 3747, 412 C.R.R. (2d) 95 ("pre-trial application reasons"), at para. 292). As in *Vu*, the cogent analysis of my colleagues on the applicable standard in this case "should serve to clarify the law" and "prevent this kind of confusion in the future" (para. 69).

[166] That said, I acknowledge the difficulties with Officer Vandervelde's evidence, as highlighted by the dissenting judge of the Court of Appeal (2020 ONCA 678, 153 O.R. (3d) 32, at para. 100). But I do not see a sufficient evidentiary basis on which to interfere with the trial judge's factual finding of good faith. I see nothing to suggest any systemic concerns regarding the police conduct in this case. Further, I agree with the trial judge that there is "no evidence of a blatant or callous disregard of the *Charter* rights by any of the three officers" (pre-trial application reasons, at para. 292). In my view, the unlawful search and seizure was the result of an honest one-off mistake, albeit one with serious implications for Mr. Stairs' right to privacy.

B. *Impact on Mr. Stairs' Charter Right to Privacy*

[167] I would accept the Crown's concession that the second *Grant* factor favours exclusion.

[168] As the trial judge recognized, an unlawful warrantless residential search violates privacy interests which lie at the very core of s. 8. I agree with my colleague

Karakatsanis J. that the sanctity of one's home is an indispensable component of personal privacy (para. 121).

[169] The police conduct in this case therefore had a serious impact on Mr. Stairs' *Charter*-protected privacy interests.

C. *Society's Interest in Adjudication on the Merits*

[170] Mr. Stairs fairly concedes that the third *Grant* factor "favours the admission of the evidence" (A.F., at para. 86). I would accept this concession.

[171] I wish to underscore the fact that the police seized over 90 grams of crystal methamphetamine. This evidence is plainly reliable and, without it, the Crown would have no case on Mr. Stairs' charge for possession for the purpose of trafficking. The sentence for this charge represented 20 months of Mr. Stairs' global 26-month sentence. I agree with the Crown that there is a significant public interest in an adjudication of the drug charge on its merits.

D. *Final Balancing*

[172] Balancing the three lines of inquiry above, I would decline to exclude the evidence under s. 24(2).

[173] Going forward, with the benefit of this Court's guidance, it will be very difficult for police to justify admission in a similar scenario to the one at bar. The modifications to the law my colleagues outline will require police to respect individual privacy rights within a home, by refraining from warrantless searches unless they reasonably suspect a search is necessary to address a safety risk. Where no such risk exists which meets the requisite threshold, the arrestee's s. 8 privacy interests should generally prevail. In other words, police should secure the home and obtain a search warrant, which is not a particularly onerous task.

[174] However, in the present case, I would not interfere with the trial judge's finding that the police were acting in good faith on their understanding of unsettled law. As I have explained, the justificatory standard for and permissible scope of a residential search incident to arrest were unclear at the relevant time. Further, society has a strong interest in the adjudication of a charge involving a large quantity of a highly dangerous and pernicious street drug.

[175] Accordingly, I would adopt the trial judge's alternative conclusion that the admission of the evidence would not bring the administration of justice into disrepute.

III. Disposition

[176] For the foregoing reasons, I would decline to exclude the evidence seized in violation of Mr. Stairs' s. 8 rights.

[177] In the result, I would dismiss the appeal and affirm the conviction.

Appeal dismissed, KARAKATSANIS, BROWN *and* MARTIN JJ. *dissenting.*

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